

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	File No. EB-02-KC-504
Pinnacle Towers, Inc.)	
Owner of Antenna Structure # 1053157 in)	NAL/Acct. No. 200232560020
Des Moines, Iowa)	
)	
Sarasota, Florida)	FRN 0006-1561-11

FORFEITURE ORDER

Adopted: August 7, 2003

Released: August 11, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000), to Pinnacle Towers, Inc. (“Pinnacle”), owner of antenna structure number 1053157 in Des Moines, Iowa, for willful violation of Section 17.50 of the Commission’s Rules (“Rules”).¹ The noted violation involves Pinnacle’s failure to clean and repaint its antenna structure to maintain good visibility.

2. On July 22, 2002, the District Director of the Commission's Kansas City, Missouri Field Office (“Kansas City Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”)² in the amount of twenty thousand dollars (\$20,000) to Pinnacle. Pinnacle filed a response on August 21, 2002.

II. BACKGROUND

3. On June 24, 2002, a Commission agent from the Kansas City Office inspected Pinnacle’s antenna structure number 1053157, located in Des Moines, Iowa (“Des Moines tower”). While conducting the inspection, the agent observed black cabling attached to the lower half to two-thirds of the structure, which covered the painted metal tower and reduced visibility of the structure. On July 22, 2002, the District Director of the Kansas City Office issued a *NAL* for \$20,000 to Pinnacle for violating Section 17.50 of the Rules. The *NAL* doubled the \$10,000 base forfeiture amount for tower painting

¹ 47 C.F.R. § 17.50.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232560020 (Enf. Bur., Kansas City Office, released July 22, 2002).

violations to \$20,000 because the Kansas City Office determined that Pinnacle had a history of violating Section 17.50 of the Rules.

4. In its response filed on August 21, 2002, Pinnacle claims that the forfeiture proposed against it is unfair for several reasons. Pinnacle argues that its recent bankruptcy filing was not taken into account in the *NAL*. Pinnacle also argues that the finding in the *NAL* that it has a history of non-compliance with the painting rules is overstated and is discriminatory against large tower owners. Pinnacle states that the painting violations cited in the *NAL* as the basis for this finding are extremely small in number considering that it owns over 2,200 registered towers and that these violations had been fixed or were in the process of being fixed when the Notices of Violation (“NOVs”) in those cases were issued. Pinnacle also claims that it did not willfully violate the painting rule because its contracts with new tower lessees specifically require the lessees to paint their cables, Pinnacle reviews its towers for Federal Aviation Administration (“FAA”) and FCC compliance on a quarterly basis, and Pinnacle had no other notice of the alleged violation. Further, Pinnacle maintains that there has been no demonstration that its violation was repeated. Additionally, Pinnacle contends that the rule prohibiting obstructions from unpainted cables has not been articulated, and any determination of obstruction is therefore arbitrary. Finally, Pinnacle asserts that the *NAL* is inconsistent with several recent forfeiture orders issued with respect to Section 17.50 painting violations. For all of these reasons, Pinnacle requests that the proposed forfeiture be eliminated or substantially reduced.

III. DISCUSSION

5. The proposed forfeiture amount in this case is being assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ Section 1.80 of the Rules,⁴ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999). In examining Pinnacle’s response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁵

6. Section 17.50 of the Rules provides that antenna structures requiring painting under the rules shall be cleaned or repainted as often as necessary to maintain good visibility. Antenna structure number 1053157, owned by Pinnacle, has specified lighting and painting requirements that include painting the structure with alternating bands of aviation orange and white. On June 24, 2002, an agent from the Kansas City Office found that the antenna structure had black cabling obscuring the orange and white paint, causing the structure to have an overall dark appearance on the lower half to two-thirds of the structure.

7. In its response to the *NAL*, Pinnacle presented several arguments in support of its position that the forfeiture should be cancelled or substantially reduced. First, Pinnacle argues that its recent bankruptcy filing was not taken into account in the *NAL*. It is unclear whether Pinnacle is asserting an inability to pay claim or is simply arguing that the forfeiture amount should have been affected by its

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 47 U.S.C. § 503(b)(2)(D).

bankruptcy filing. If Pinnacle is claiming an inability to pay, the *NAL* explicitly stated that the Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Pinnacle did not provide any financial documentation in support of its request for cancellation or reduction of the forfeiture and, therefore, we have no basis upon which to analyze an inability to pay claim. Further, although there is precedent for reducing or rescinding a forfeiture based on bankruptcy in certain circumstances,⁶ we do not believe that Pinnacle has justified a reduction or rescission in this case because it has not provided financial documentation for the Bureau's analysis, and because, even though it has filed bankruptcy, it retains control over its assets. Moreover, filing for bankruptcy does not preclude the Commission from issuing an order imposing a forfeiture upon Pinnacle.⁷

8. Pinnacle also argues that the finding in the *NAL* that it has a history of non-compliance with the painting rules is overstated and is discriminatory against large tower owners. Pinnacle states that the painting violations cited in the *NAL* as the basis for this finding are extremely small in number considering that it owns over 2,200 registered towers and that they had been fixed or were in the process of being fixed when the NOV's were issued. The *NAL* doubled the \$10,000 base amount for this violation to \$20,000 because Pinnacle had been issued three prior NOV's for violations of Section 17.50 of the Rules. However, the record reflects that in two of these prior cases, Pinnacle was aware of the painting problems and had begun to take corrective measures prior to the inspections that led to the NOV's. We do not believe that the one remaining prior violation of Section 17.50 is sufficient to justify doubling the base forfeiture amount for the violation in the instant case. Consequently, we reduce the forfeiture amount to \$10,000.

9. Next, Pinnacle claims that it did not willfully violate the painting requirement because Pinnacle's contracts with new tower lessees specifically require them to paint their cables, Pinnacle reviews its towers for FAA and FCC compliance on a quarterly basis, and Pinnacle had no notice of alleged violations. Pinnacle asserts that "The latest quarterly report for the Des Moines tower did not indicate that the tower had any marking problem. The contractor employed by Pinnacle did not understand that unpainted lines can obstruct a tower's visibility in violation of FCC rules."

10. As the Commission recently reiterated, "the Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors and has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations."⁸ Pinnacle is, therefore,

⁶ See, e.g., *Dennis Elam, Trustee for Bakcor Broadcasting, Inc., Debtor*, 11 FCC Rcd 1137 (1996) (forfeiture rescinded after bankruptcy trustee was appointed and the violator was no longer associated with the subject radio stations); *Interstate Savings, Inc. d/b/a ISI Communications*, 12 FCC Rcd 2934 (CCB 1997) (forfeiture rescinded where trustee was appointed in Chapter 7 liquidation, removing violator from operating as a common carrier and from involvement in dissolution or distribution of assets. Requiring trustee to pay the forfeiture would diminish estate assets available to innocent creditors and serve no public interest purpose.).

⁷ See 11 U.S.C. § 362(b)(4). See *Coleman Enterprises, Inc.*, 16 FCC Rcd 24385, 24389 n. 28 (2000) (filing for chapter 11 bankruptcy does not preclude the Commission from issuing an *Order of Forfeiture*). See also *United States of America v. Commonwealth Companies, Inc.*, 913 F.2d 518 (8th Cir. 1990).

⁸ See, e.g., *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002) (internal quotation

chargeable with knowledge of its contractor's observation of unpainted cables at the Des Moines tower even if the contractor failed to provide this information to Pinnacle. Additionally, one of the NOV's referenced in Paragraph 8, above,⁹ put Pinnacle on notice concerning the need to paint the cables. We conclude that Pinnacle's violation of the painting requirement was willful.

11. Section 503(b) of the Act gives the Commission authority to assess a forfeiture penalty against any person if the Commission determines that the person has "willfully or repeatedly" failed to comply with the provisions of the Act or with any rule, regulation or order issued by the Commission. In light of our determination that Pinnacle's violations were willful, it is not necessary to determine whether they were also repeated.¹⁰

12. Additionally, Pinnacle contends that the rule prohibiting obstructions from unpainted cables has not been articulated and any determination of obstruction is therefore arbitrary. We disagree. Pinnacle acknowledges that the antenna structure registration for its Des Moines tower requires it to comply with FAA Advisory Circular AC 70/7460-1J. This Advisory Circular explicitly states that "alternative bands of aviation orange and white are normally displayed on ... coaxial cable, conduits and other cables attached to the face of a tower."¹¹ Thus, any cables attached to the face of Pinnacle's tower are required to be painted.¹² Moreover, the agent inspected the tower and determined that the unpainted cables did, in fact, obscure the visibility of the tower in violation of Section 17.50 of the Rules. Further, the photographic evidence provided by the agent supports his determination that Pinnacle's tower was indeed obstructed by the cables.

13. Finally, Pinnacle asserts that the *NAL* is inconsistent with several recent forfeiture orders issued with respect to Section 17.50 painting violations. Specifically, Pinnacle argues that in three prior cases, forfeitures of \$19,000 or \$20,000 were assessed for multiple rule violations, including a Section 17.50 violation, whereas in this case a \$20,000 forfeiture was proposed for a single violation of Section 17.50. Because we have reduced the forfeiture in this case to the \$10,000 base forfeiture amount, we need not address this argument. Pinnacle also asserts that in these prior cases, the tower owner was given an NOV and an opportunity to cure the violation prior to issuance of the *NAL*. However, there is no requirement that the Commission issue an NOV or provide a violator an opportunity to cure a violation prior to issuing an *NAL*.¹³

marks omitted) and cases cited therein.

⁹ That *NOV* was issued on January 15, 2001, by the Commission's Tampa, Florida, Field Office, for violation of Section 17.50 of the Rules because of unpainted cables running along the side of the antenna structure.

¹⁰ *Koke, Inc.*, 23 FCC 2d 191 (1970).

¹¹ FAA Advisory Circular AC 70/7460-1J, Obstruction Marking and Lighting, Chapter 3, Marking Guidelines, Paragraph 33(d)(7).

¹² See *Pinnacle Towers, Inc.*, 18 FCC Rcd 6419, 6419-6420 (Enf. Bur. 2003).

¹³ See 47 C.F.R. § 1.89; *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 n. 20; and *WOYK, Inc.*, DA 03-2367, fn. 8 (Enf. Bur. released July 22, 2003).

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁴ Pinnacle **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for failure to clean and repaint its antenna structure to maintain good visibility, in willful violation of Section 17.50 of the Rules.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁵ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200232560020 and FRN 0006-1561-11. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁶

16. **IT IS FURTHER ORDERED** that copies of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Pinnacle Towers, Inc., 301 N. Cattlemen Road, 3rd Floor, Sarasota, Florida 34232 and its counsel, Thomas B. Magee, Esq. Keller and Heckman LLP, 1001 G Street, Suite 500 West, Washington, DC 20001.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁴ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁵ 47 U.S.C. § 504(a).

¹⁶ See 47 C.F.R. § 1.1914.